United States Court of Appeals

for the Second Circuit

APPENDIX

INDEX TO APPENDIX

Docket Entries A

D. C. APPEAL
CRIMINAL DOCKET

75CR 177

MISHLER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. X LEONARD DURSO, X RICHARD FABELLA, amended 7/10/75) X WILLIAM MORTON, JOHN DOE a/k/a "Bebe" and X CHRISTOPHER WILLIAMS	For U. S.: For Defendant: WILLIAM MORTON a/k/a Bebe Jeffrey Weingard-401 Broadwa N.Y., N.Y. 226-6820

UNITED STATES COURT OF APPEALS
FILED
OCT 9 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Extortion

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED: DATE	NAME	RECEIVED	DISBURSED
Fine,			9/19/75	Notice of appeal (without fee)		
Clerk,				(FABELLA) (DURSO) (MORTON)		
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						

DATE	PROCEEDINGS
3-10-75	Before Platt, J - Indictment filed - Bench Warrant ordered for deft JOHN DOE aka "Bebe".
3/11/75	Bench warrant issued (JOHN DOE)
3-11-75	Before Platt, J - Bench Warrants ordered for defts WILLIAMS & FABELLA.
	Bench Warrants Issued for defts WILLIAMS & FABELLA.
3-13-75	Notice of Appearance filed (FABELLA)
3-13-75	Before PLATT, J - case called - Deft Fabella produced in court on a Bench Warrant - Deft arraigned and having been advised of his rights and on his own behalf enters a plea of not guilty - bail set at $25,000 secured by personal recog. bond - deft in custody of his attorney for 24 hours - adjd to Mar. 18, 1975 for status & report.

B

5CR 177

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
3/21/75	Before MISHLER, CH.J.- Case called- Defts DURSO and WILLIAMS present- Durso and Waler Counsel for defts not present-Court appoints Legal Aid as counsel for deft Williams- Deft Durso arraigned and the court enters a plea of not g on behalf of deft- bail increased to $7,500.00 Surety Co. Bond to be post 4:00 P.M. today-Deft Williams arraigned and enters a plea of not guilty- Bail set at $2,000.00 P.R. Bond- April 4, 1975 set for fixing of trial		
3/21/75	Notice of readiness for trial filed		
3-25-75	Notice of Motion filed, ret. 4-4-75. for Discovery, Particulars and severance (DURSO)		
3/26/75	Notice of appearance filed		
4-4-75	Before MISHLER, CH J-case called -all defts present with counsels except deft JOHN DOE - case adjd to 4-11-75 at 2:00 pm to set a trial date.		
4-4-75	Before MISHLER, CH J - case called - motions for discovery, Bill of Particulars, severance, argued - ~~xxxxxx~~ motions for discovery and Particulars granted and denied ~~x~~ in part as indicated on the record and decision reserved in part. Motion by deft Durso for severance argued and to be continued - motion for severance adjd to 4-11-75 at 2:00 PM		
4-9-75	Memorandum of deft DURSO filed with regard to omnibus motion (forwarded to Chambers)		
4/11/75	Before MISHLER,CH.J.- Case called- Motion by deft Williams to be severe from trial granted on consent of Govt-Motion to server as to deft Durso argued-decision reserved - Case set down for ~~xxxxxx~~ 4/18/75 to set trial		
4-18-75	Before MISHLER, CH J - case called - defts not present - counsels present - Elliot Wales for deft Durso and Joseph Monica for deft Fabella July 14, 1975 for trial.		
5/13/75	By MISHLER,CH.J.- Memorandum of Decision and Order filed granting and denying defts Durso and Fabella's motion for bill of particulars		
5/13/75	By MISHLER, CH.J.- Memorandum of Decision and Order filed denying motion to dismiss		
6/6/75	Before MISHLER,CH.J.- Case called- Deft WILLIAM MORTON a/k/a BeBe present without counsel- Court advised deft of his rights-Bail set at $25,000.00 PR Bond with wife to sign as surety- Deft's mother's house as equity- Deft arraigned and Court enters a plea of not guilty- on behalf of deft Deft to retain counsel		
6/20/75	Before MISHLER, CH.J.- Case called- Deft present without counsel- case adjd to 6/27/75 at 9:30 A.M. for assignment of counsel (MORTON a/k/a Bebe)		
6-24-75	Before MISHLER, CH J - case called - deft DURSO & counsel Elliot Wales present - July 14, 1975 for trial		

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CRIMINAL DOCKET

C

DATE	PROCEEDINGS
6/27/75	Before MISHLER, CH.J.- Case called- Deft Morton and counsel present- Trial set for 7/14/75 (WILLIAM MORTON a/k/a Bebe)
7/7/75	Notice of appearance filed(WILLIAM MORTON a/k/a Bebe)
7/8/75	Before MISHLER, CH.J.- Case called- Motion for severance and continuance denied- motion to dismiss argued- decision reserved(MORTON a/k/a Bebe)
7/10/75	By MISHLER, CH.J.- Memorandum of Decision and Order filed that motion of deft Mortion to dismiss denied-and govt's motion to amend caption granted
7/11/75	75 M 495 is inserted in CR file.
7-14-75	Before MISHLER, CH J - case called - defts DURSO, FABELLA & MORTON present with attys - Onbmotion of AUSA Katz count one of the indictment is dismissed. Amended indictment marked Court's Exhibit 1 for Id (75 CR-177) trial ordered and Begun - Jurors selected and sworn - John Doe a/k/a "Bebe" is amended to read William Morton aka "Bebe". Trial contd to July 15,1975.
7/15/75	Before MISHLER, CH.J - Case called- Deft present with counsel-Trial resumed-Trial contd to 7/16/75 at 10:00 A.M.
7/15/75	Financial Affidavits of defts Mortonand Fabella filed
7/16/75	Before MISHLER, CH.J.- Case called- Defts and counsel present-Trial resum motion by deft Morton -for severance denied-Trial contd to 7/17/75 at 10:00 A.M.- all requests to charge by 7/18/85 at 4:00 P.M.
7/17/75	Before MISHLER, CH.J.- Case called- Defts and counsel preset- Trial resumed- Motion by deft Morton for a mistrial denied- Trial contd to 7/21/75 at 10:00 A.M.
7-21-75	Voucher for Expert Services filed .
7-21-75	Before MISHLER, CH J - case called - defts DURSO,FABELLA, & MORTON present with attys - trial resumed -Govt rests - Motion by deft DURSO for judgment of acquittal is denied; motion by defts Fabella & Morton for judgment of acquittal is denied; motion by deft Morton for severance is denied - trial contd to July 22,1975.
7-22-75	Before MISHLER, CH J - case called - defts DURSO, FABELLA & MORTON present with attys - trial resumed - deft DURSO rests - deft FABELLA rests - deft MORTON rests - Trial contd to 7-23-75/
7-23-75	Before MISHLER, CH J - case called - defts & attys present- trial resumed - Court charges Jury - Jury to start their deliberations on July 24, 1975 at 9:30 am - trial contd to 7-24-75., 9:30 am
7-23-75	By MISHLER, CH J - Order of sustenance filed (Lunch)
	(Orig)

D. C. 109

DATE	PROCEEDINGS
/24/75	Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial resum
	Jury retires to deliberate - At 7;00 P.M. jury asked to suspended delibera
	and return on 7/25/75-trial contd to 7/25/75 at 9:30 A.M.
/24/75	By MISHLER, CH.J.- Order of sustenance filed
-25-75	Before MISHLER, CH J - case called - defts & attys present - trial
	resumed - at9:35 am the jury continued their deliberations - at 5:40 PM
	the jury returned and asked to suspend for the day and return on 7-28-75
	at 9:30 am for further deliberations - trial contd to 7-28-75 at 9:30 am.
25-75	By MISHLER, CH J - Order of sustenance filed (Lunch-14 persons)
/28/75	Before MISHLER, CH.J.- Case called- Defts and counsel present-Trial resur
	Jury resumes deliberations- Jury returns and renders a verdict of guilty
	on counts 2,3,5,7,9 and not guilty on counts 4,6,and 8 as to deft Durso-
	and not guilty on count 6 as to deft Fabella- and guilty on counts 7 and guilty on counts 5 and 9 and
	9 and not guilty on count 8 as to deft Morton- Jury polled- jury discha
	all motions reserved until time of sentence-motion by Govt to increase
	bail as to deft Durso- decision reserved-bail conditions contd as to all
	defts-sentence adjd without date- trial concluded
7/28/75	By MISHLER, CH.J.- Order of sustenance filed
7/28/75	Memorandum of verdict filed (counts renumbered for purpose of trial)
8-6-75	Voucher for Expert services filed. ~~Durso~~
9/19/75	Before MISHLER,CH.J.- Case called- Deft FABELLA and counsel present- motio
	by deft for judgment of acquittal denied-deft sentenced on count 5 for
	a period of 5 years and on count 9 for a period of 5 years plus a speci l
	parole term of 5 years-said sentences to run concurrently-notice of appea
	to be filed without fee- bail conditions contd-
9/19/75	Judgment and Commitment filed- certified copies to Marshal(FABELLA)
9/19/75	Notice of appal without fee filed(FABELLA)
9/19/75	Docket entries and duplicate offnotice of appeal mailed to court of appea
9/19/75	Before MISHLER, CH.J.- Case called- Defts Morton and Durso present with
	counsel-motions by defts for judgments of acquittals denied-Deft MORTON
	sentenced to a term of imprisonment for 2 years on each of counts 7 and
	9 and a special parole term of 5 years- said sentences to run concurrent
	notice of appeal to be filed without fee- bail conditions contd- Deft
	DURSO sentenced on each of counts 2 3 and 5 for 10 years and on counts
	7 and 9 for a period of 10 years plus a special parole term of 5 years-
	sentences to run concurently-notice of appeal to be filed without fee-
	bail increased to $25,000.00 surety Co. Bond-Deft CHRISTOPHER not present

E

75 CR 177

CRIMINAL DOCKET

DATE	PROCEEDINGS
	counsel present- Trial adjd to 11/3/75
9/19/75	Judgments and Commitments filed-certified copies to Marshal(DURSO and MORTON)
9/19/75	Notices of appeal(2) without fee filed(DURSO and MORTON)
9/19/75	Docket entries and duplicate of notice of appeal mailed to court of appeals
9/22/75	Stenographers Transcripts dated July 14,15,16,17,21,22,23,24,25 and 28 filed
9-25-75	Certified copy of Judgment & Commitment retd and filed - deft. delivered to Warden, MCC, NY (DURSO)
9/30/75	75 M 1623, 1622 is inserted in CR file.
10-2-75	Certified copy of Judgment & Commitment retd and filed - Deft DURSO delivered to USP, Lewisburg, Pa.
10-7-75	Order received from the Court of Appeals that the Record be docketed on or before Oct. 14, 1975

A TRUE COPY ATTEST
10/8/75
LEWIS ORGEL, CLERK
BY Rose Ford DEPUTY CLERK

D. C. 109

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
9	19	1975

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL H. Elliot Wales, Esq. (Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY. in Counts 2, 3, 5, 7 and 9

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 894, T-21 U.S.C. Sec. 841(a)(1), in that on or about Aug. 8, 1974, August 11, 1974 and Sept. 13, 1974, the defendant knowingly used extortionate means with in the meaning of T-18, U.S.C. Sec. 891(7), to attempt to collect an extension of credit from another, and to punish said person for the non-payment thereof, and on or about Feb. 1974 and on or about and between Feb. 1974 and July 1974, both dates being approximate and inclusive, the defendant knowingly, intentionally and unlawfully did conspire to distribute and to possess with intent to distribute, and the defendant did, knowingly, intentionally and unlawfully distribute and possess with intent to distribute quantities of cocaine, a [illegible] in violation of Sections 846 and 841(a)(1) of Title 21, United States Code. The court asked [illegible] why judgment should not be pronounced against him. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

10 years on each of Counts 2, 3 and 5 and 10 years plus a special parole term of 5 years on Counts 7 and 9, said sentences to run concurrently.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 9/19/75

BY [signature] ☐ CLERK ☒ DEPUTY

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

[signature]

Date 9/19/75

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 9 DAY 19 YEAR 1975

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jeffrey Weingard, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. in Couhts 7 and 9

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Sec. 841(a)(1) in that on or about Feb., 1974 and on or about Feb. 1974 and July 1974 both dates being approximate and inclusive the defendant knowingly, intentionally, and unlawfully did conspire to distribute, and to possess with intent to distribute, and the defendant did distribute and possess with intent to distribute quantities of cocaine, a Schedule II controlle substance.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

2 years on each of counts 7 and 9 plus special parole term of 5 years - said sentences to run concurrently.

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y. ★ SEP 19 1975 ★ TIME A.M. P.M.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Jacob Mishler

Date 9/19/75

23

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 9 DAY 19 YEAR 1975

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Joseph Monica, Esq. (Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of { ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY. in Counts 5 and 9

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 894(a) and T-21, U.S.C. Sec. 846, in that on or about Sept. 13, 1974, the defendant knowingly, used extortionate means, within the meaning of T-18, U.S.C. Sec. 891(7), to attempt to collect an extention of credit from another, and to punish said person for the non-repayment of credit therof, and on or about and between Feb. 1974 and July 1974 both dates being approximate and inclusive, the defendant knowingly, intentionally and unlawfully did conspire to distribute and to possess with intent to distribute quantities of cocaine, a Schedule II narcotic controlled substance,

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

5 years on count 5, and for a period of 5 years on count 9 plus special parole term of 5 years - said sentences to run concurrently.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
SEP 19 1975
TIME A.M.
P.M.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Jack B. Weinstein

Date 9/19/75

UNITED STATES OF AMERICA

-v-

LEONARD DURSO, RICHARD FABELLA, JOHN DOE a/k/a "Bebe" and CHRISTOPHER WILLIAMS

Defendants

----------x

INDICTMENT

18 U.S.C. §894

75 CR 177

3-10-75

4a-

THE GRAND JURY CHARGES:

COUNT ONE

On or about March 20, 1974, in the Eastern District of New York, the defendant LEONARD DURSO knowingly used extortionate means, within the meaning of Title 18, United States Code, Section 891(7), to attempt to collect an extension of credit from Harry Haralambus and to punish Harry Haralambus for the non-repayment thereof.

(Title 18, United States Code, Section 894(a))

COUNT TWO

On or about August 8, 1974, in the Eastern District of New York, the defendant LEONARD DURSO, knowingly used extortion means, within the meaning of Title 18, United States Code, Section 891(7), to attempt to collect an extension of credit from Harry Haralambus and to punish Harry Haralambus for the non-repayment thereof.

(Title 18, United States Code, Section 894(a))

COUNT THREE

On or about August 11, 1974, in the Eastern District of New York, the defendant LEONARD DURSO knowingly used extortionate means within the meaning of Title 18, United States Code, Section 891(7), to attempt to collect an extension of credit from Harry Haralambus for the non-repayment thereof.

(Title 18, United States Code, Section 894(a))

COUNT FOUR

On or about August 21, 1974, in the Eastern District of New York, the defendant LEONARD DURSO knowingly used extortionate means within the meaning of Title 18, United States Code, Section 891(7), to attempt to collect an extension of credit from Harry Haralambus and to punish Harry Haralambus for the non-repayment thereof.

COUNT FIVE

On or about September 13, 1974, in the Eastern District of New York, the defendant LEONARD DURSO and the defendant RICHARD FABELLA knowingly used extortionate means, within the meaning of Title 18, United States Code, Section 891 (7), to attempt to collect an extension of credit from Harry Haralambus and to punish Harry Haralambus for the non-repayment thereof.

(Title 18, United States Code, Section 894 (a)

COUNT SIX

From on or about February, 1974 until on or about September, 1974, both of which dates are approximate and inclusive, within the Eastern District of New York, the defendant LEONARD DURSO and the defendant RICHARD FABELLA, and other persons to the Grand Jury known and unknown, knowingly conspired to use extortionate means, within the meaning of Title 18, United States Code, Section 891 (7), to collect and attempt to collect an extension of credit from Harry Haralambus and to punish Harry Haralambus for the non-repayment thereof.

(Title 18, United States Code, Section 894 (a)

COUNT SEVEN

On or about February, 1974, within the Eastern District of New York, the defendants LEONARD DRUSO and the defendant JOHN DOE "BEBE" knowingly, intentionally, and unlawfully did distribute and possess with intent to distribute approximately one-quarter pound of cocaine, a Schedule II controlled substance.

(Title 21, United States Code, Section 841 (a) (1) and
Title 18, United States Code, Section 2)

COUNT EIGHT

On or about March 14, 1974, within the Eastern District of New York, the defendants LEONARD DURSO and the defendant JOHN DOE "BEBE" knowingly, intentionally, and unlawfully did distribute and possess with intent to distribute approximately one-quarter pound of cocaine, a Schedule II controlled substance.

(Title 21, United States Code, Section 841 (a) (1) and
Title 18, United States Code, Section 2)

COUNT NINE

On or about and between February, 1974 and July, 1974, both dates being approximate and inclusive, within the Eastern District of New York, and elsewhere the defendants LEONARD DURSO, RICHARD FABELLA, JOHN DOE a/k/a "Bebe", CHRISTOPHER WILLIAMS, and HARRY HARALAMBUS, unindicted co-conspirator, and others to the Grand Jury known and unknown, knowingly, intentionally, and unlawfully did conspire with each other to distribute and to possess with intent to distribute quantities of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

(Title 21, United States Code, Section 846)

A TRUE BILL.

FOREMAN

DAVID G. TRAGER, UNITED STATES ATTORNEY

7a

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

Criminal Action No. 75CR177

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

—Against—

LEONARD DURSO, ET AL

INDICTMENT

DAVID G. TRAGER
United States Attorney,
Attorney for U.S.A.E.D.N.Y.
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-SM-6-73-7355

Marsha Katz, Special Attorney
212-596-3761

9a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

- against -

LEONARD DURSO, et al.,

Defendant.

- - - - - - - - - - - - - - - - - -x

No. 75-CR-177

Memorandum of Decision and Order

May 12, 1975

Defendants Durso and Fabella demand a bill of particulars specifying the "date, time and place" of each offense charged in counts one to five, and seven and eight. Defendants further request that the government provide the names of co-conspirators and aiders and abettors, if any (Rule 7(f) of the Federal Rules of Criminal Procedure), and state whether the substantive crimes are "the overt acts for the conspiracy count."

The purpose of a bill of particulars is to inform a defendant sufficiently of the charges against him so that he can prepare his defense, avoid surprise at trial and gain protection against further prosecution for the same offense, United States v. Martinez, 466 F.2d 679 (5th Cir. 1972); United States v. Leach, 427 F.2d 1107 (1st Cir), cert. denied, 400 U.S. 829, 91 S.Ct. 95 (1970); United States v. Mavrogiorgis,

FPI—SS—3-17-72—30M—9153

49 F.R.D. 214 (S.D.N.Y. 1969).

Counts one to five of the indictment state the approximate date on which each alleged offense was committed, and identify the victim as Harry Haralambus. It would be appropriate for the government to supply information concerning the means employed in each count. Thus, the government should indicate in each instance whether the alleged injury or embarrassment to Haralambus or his family as well as the assault on Haralambus or a member or members of his family were carried out by telephone or in person. The demand is so modified, and as modified, granted. In all other respects the demand as to date, time and place is denied as to counts one to five and seven and eight (requested items 1 and 3). United States v. Leach, supra; United States v. Long, 449 F.2d 288, 294 (8th Cir. 1971), cert. denied, 405 U.S. 974, 92 S.Ct. 1206 (1972).

Items 2 and 4 of the demand request the government to state whether the substantive counts are the overt acts in the conspiracy counts. This demand appears to be designed to limit the government's proof to the overt acts alleged as substantive offenses. Such a request is not aimed at the legitimate goal of enabling defendant to prepare his defense.

Consequently, requests 2 and 4 are denied. /1

Item 5 seeks to have the government provide the names of any other co-conspirators who participated in the conspiracies charged in counts 6 and 9. It is important to the defense to know the identity of those conspirators known to the government, since statements or acts of these conspirators may be charged against defendant. Therefore, the government is directed to supply the names of persons known to have conspired in the conspiracies charged in counts 6 and 9, United States v. King, 49 F.R.D. 51 (S.D.N.Y. 1970), United States v. Rosen, 303 F.Supp. 210 (S.D.N.Y. 1969).

Item 6 requests the names of principals or aiders and abettors in the charges in counts 7 and 8. This request is denied.

SO ORDERED.

Jacob Mishler
U. S. D. J.

/1 This request is similar to a request requiring the government to state any additional overt acts upon which the government intends to rely. Such requests are generally denied, United States v. Leach, supra, United States v. Iannelli, 53 F.R.D. 482 (S.D.N.Y. 1971).

FPI—SS—3-17-72—3034—0153

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -

75 CR 177

UNITED STATES OF AMERICA

-against-

Memorandum of Decision and Order

LEONARD DURSO, a/k/a "Duce Gallo", RICHARD FABELLA, JOHN DOE, a/k/a "Bebe" and CHRISTOPHER WILLIAMS,

Defendants.

May 13, 1975

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MISHLER, CH. J.

The first four counts of this nine-count indictment charge Leonard Durso with using extortionate means to collect an extension of credit from one Harry Haralambus (18 U.S.C. §894(a)). Count six charges Leonard Durso and Richard Fabella with conspiracy to use extortionate means to collect an extension of credit from Haralambus. Counts seven and eight charge Durso and one John Doe, also known as "Bebe", with possession of one-quarter pound of cocaine (21 U.S.C. §841(a)(1)) in February, 1974, and on or about March 14, 1974; and count nine charges all the defendants with a conspiracy to possess with intent to distribute cocaine (21 U.S.C.§896).

Defendant Durso (defendant Fabella joins in the application) moves pursuant to Rules 8 and 14 of the Federal

Rules of Criminal Procedure to sever counts eight and nine as improperly joined offenses under Rule 8(a), and to sever defendants John Doe and Williams as improperly joined defendants (under Rule 8(b)).[1]

Durso's argument relating to his motion for severance of counts eight and nine is that the extortion charges and the narcotic charges are "two categoric offenses" and therefore cannot be properly joined. The test for joinder of two or more offenses is set forth in F.C.R. 8(a) as follows (in pertinent part):

> Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are based on . . . two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The government represents that the evidence will show that Durso and Fabella entered into a conspiracy with Haralambus to distribute cocaine in or about February, 1974, and that this conspiracy continued into July, 1974. According to the government's account, in February, 1974, Durso delivered cocaine to Haralambus, but Haralambus failed to pay for the drugs. Count one charges that Durso used extortionate means to collect money from Haralambus for the drugs. The government charges that despite Haralambus' failure to pay, Durso made two deliveries of cocaine to him in June, 1974.

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[1] The government consented to severance of the charges against Williams.

(Apparently Haralambus paid Durso for these deliveries.) All the remaining counts charging violations of 18 U.S.C. §894(a) (counts two to six) refer to Durso's attempts to collect money Haralambus owed him from the February 1974 transaction.

On the basis of these assertions, it is clear that the extortionate means counts (one to seven) and the narcotics violation counts (eight and nine) are "connected together or [constitute] parts of a common scheme or plan." United States v. Leonard, 445 F.2d 234 (D.C.Cir. 1971). Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).[2] Additionally, the court is convinced that the same evidence would be offered in the trial of defendant on the extortion charges even if counts eight and nine were severed. Consequently, the motion to sever counts eight and nine is denied.

The pattern of activity involving Durso, Fabella and John Doe clearly establishes a basis for joining them as defendants. Rule 8(b) provides:

/2 In Leonard, burglary charges were joined with charges of forgery and uttering in the use of credit cards which were stolen in the burglary. In Bayless, burglary charges, based on a burglary committed while defendant escaped from custody at the Federal Correctional Institution at McNeil Island, were joined with escape charges.

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Under this rule, even though an indictment charges various, distinct offenses, and all defendants are not named in each count, joinder is proper if the separate offenses all relate to a single unlawful transaction or series of transactions. United States v. Leach, 429 F.2d 956, 960 (8th Cir. 1970). The proof which the government states that it is prepared to put forward clearly complies with this standard. The motion to sever defendant John Doe is denied.

Defendant Durso also moves to dismiss counts one to five on the ground that these counts are multiplicitous. 18 U.S.C. §894(a) [3] makes the conduct unlawful in the use of

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[3] 18 U.S.C. §894(a) provides:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
> (1) to collect or attempt to collect any extension of credit, or
> (2) to punish any person for the nonrepayment thereof,
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

extortionate means. The underlying indebtedness is merely the reason for employment of this unlawful conduct. United States v. Biancofiori, 422 F.2d 584, 585 (7th Cir.), cert. denied, 388 U.S. 942, 90 S.Ct. 1857 (1970).[4] Here, each count charging extortionate means is alleged to have occurred at a different time. The government also represents that different means were employed on each occasion. United States v. Crummer, 151 F.2d 958 (10th Cir. 1945), cert. denied, 327 U.S. 785, 66 S.Ct. 704 (1946); United States v. Schall, 371 F.Supp. 912, 927 (W.D. Pa. 1974).[5] It is clear then, that each count alleges a separate offense, even though the debt is the same. Therefore, the motion to dismiss counts one to five for multiplicity is denied.

SO ORDERED.

U. S. D. J.

/4 In Biancofiori the loan was made before the effective date of 18 U.S.C. §894 (May 29, 1968). Defendant argued that no crime was committed in the use of extortionate means at the time §894 became effective.

/5 Crummer and Schall involved prosecutions under 18 U.S.C. §1341 (mail fraud).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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75 CR 177

UNITED STATES OF AMERICA

-against-

Memorandum of Decision and Order

JOHN DOE, also known as "Bebe",

Defendant.

July 10, 1975

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MISHLER, CH. J.

Defendant William Morton moves to dismiss the indictment on the ground that he is named therein as John Doe, also known as "Bebe". Defendant does not deny that he is known by the name of Bebe. The government cross-moves to amend the indictment to substitute "William Morton, also known as 'Bebe'" in place and instead of "John Doe, also known as 'Bebe'".

The court has read the minutes of the grand jury, and it is clear from the testimony adduced there that Mr. Morton is the party named as John Doe in the indictment. [1]

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[1] At one point, the defendant is referred to as "'Bebe' Morton."

The amendment (pursuant to Rule 7(e) of the Federal Rules of Criminal Procedure) is one of form and not of substance. The defendant was apprised of the charges against him. The failure to name him by his given name in no way prejudiced defendant. Defendant is entitled to be tried under his true name. This right provides defendant with a double jeopardy defense in the event that he is named in a subsequent prosecution for the same offense under his true name, United States v. Campbell, 235 F. Supp. 94 (E.D. Tenn. 1964), United States v. Owens, 334 F. Supp. 1030 (D. Minn. 1971).[2]

Defendant's motion is denied. The government's motion to amend is granted, and it is

SO ORDERED.

U. S. D. J.

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[2] In Campbell and Owens, the defendants names as they appeared on the indictment were erroneous, i.e., Bill Campbell and Charles Rush (true names Charles Campbell and Garland Rush). The instant case is not one of misnomer.

A I believe it was a fellow named Junior.

Q And before Junior had you spoken to anyone else concerning possible drug transactions?

A Yes.

Q And who was this individual?

A I believe his name was Allen.

Q As a result of that conversation with this individual whom you know as Allen, did you receive any drugs?

MR. MONICA: I object to this if the Court please. I don't know the relevancy to this matter.

THE COURT: Objection overruled. I don't know it either at this point.

MR. WEINGARD: Your Honor, I object on the ground it constitutes hearsay evidence.

THE COURT: I will allow it.

Q Did you receive some drugs?

A I believe I did, yes.

Q What type of drugs did you receive?

A I believe it was either cocaine or heroin.

Q And what did you do with these drugs?

A I believe I gave it to the DEA agents.

THE COURT: I didn't hear you.

THE WITNESS: I believe I gave it to the DEA agents.

you said to him.

MR. WEINGARD: I have an objection on the ground that it constitutes hearsay and that if it is offered with respect to the defendant Morton it would also deprive him of his right to confrontation in violation of the Sixth Amendment of the Constitution.

No conspiracy has been as yet shown and therefore declarations --

THE COURT: I get the point.

MS. KATZ: Your Honor --

THE COURT: I will give the jury a limiting charge.

Will you please sit down. I won't do it until you are seated, Mr. Weingard.

MR. WEINGARD: Certainly.

THE COURT: In every criminal case and as a matter of fact in almost every type of proceeding the individual to be charged may be charged only with what that individual says and what that individual did or does. In this case the other defendants, both Mr. Durso and Mr. Morton, are saying in effect this is what this witness says Mr. Fabella said and did, and it had nothing to do with us. There is one exception -- there may be more than one exceptions --

but the relevant exception is this, where the Government charges a conspiracy or where the indictment claims a conspiracy exists, then whatever one conspirator says or does during the term of the conspiracy and in pursuance of the purposes of the conspiracy, and in this case Count 8 of the indictment charges that the purpose of the conspiracy was to distribute and to possess with intent to distribute quantities of cocaine. And that means going into the business of distributing cocaine.

So that conversations or acts during the term of the conspiracy to further the purposes of the conspiracy made, or said, or done by one conspirator then binds everyone else that you find knowingly and wilfully entered into the conspiracy.

An analogy is a partnership. If myself and let us say one of you were in the grocery business, and let's assume that I was the man behind the counter selling to the retail trade and you went out to do the buying. Let's assume you went out and bought 100 cases of corn for the partnership. Even though I didn't like the deal and would have opposed it, the fact that it was made by one partner during the term of the partnership for the purposes of the grocery store, the

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partnership, I would be bound by it.

So in a charge of an unlawful conspiracy, if the Government proves beyond a reasonable doubt that the conspiracy charged in the indictment existed; that one of the parties to the conversation was a member of the conspiracy, and what he said and what he did was during the term of the conspiracy -- and here the term of the conspiracy is alleged to be on or about and between February 1974 and July 1974. And what was done and what was said was to further the interests and the purposes of the conspiracy, then any one of the accused who you find knowingly and willfully entered to that conspiracy is chargeable with what was said and done even though he was not present at the time.

Now, in order to find any defendant knowingly and willfully entered into the conspiracy you will have to find through the testimony given by the witness that that individual was aware that the parties got together for the purpose of dealing in cocaine, and that knowing that he did something to further the purposes of the conspiracy, that he willfully entered into the conspiracy knowing that that was a violation of law.

Now, if the Government doesn't prove all that, then disregard it as it affects the accused Durso and Morton.

MR. MONICA: Sir, may I therefore with respect to your Honor's explanation to the jury object to this testimony on the ground that it occurred prior to this conspiracy --

THE COURT: What was the date?

MR. WEINGARD: Your Honor, we are talking about an incident --

THE COURT: The winter?

Can you fix the date of this conversation?

THE WITNESS: Not to the best of my knowledge, sir.

THE COURT: About.

THE WITNESS: The winter of '73 or the fall of '74 -- December 1973, January 1974.

THE COURT: On or about February doesn't mean that the Government must prove that the conspiracy started precisely on February 1st. The allegation is on or about February 1974.

And if the Government proves that it is a date that is reasonably close to February 1974, then you may use it as I indicated. If you find it was not

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during the term of the conspiracy, then don't charge it against the individual defendant.

MS. KATZ: May I point out that the indictment reads, "which dates are approximate."

THE COURT: Yes.

MR. WEINGARD: Your Honor, if I may continue with my objection.

THE COURT: Please do, but make it brief. I don't take argument before the jury. If you want to argue anything I will excuse the jury. Just state the ground as to whether it is hearsay, irrelevant, or any other ground.

MR. WEINGARD: I am going to object on the ground that these declarations were made at a time when the conspiracy hadn't yet started --

THE COURT: That's a fact question for the jury. I charge the jury that if it is not within the term of the conspiracy, don't charge it against either Mr. Morton or Mr. Durso.

Next question, Miss Katz.

BY MS. KATZ:

Q I would like my question answered. The witness had not yet had a chance to answer my question.

Will you relate to us, if you can, what Mr.

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number of ways. The proper question is: In your presence were any phone calls made or were you told by Peter that a phone call was made?

He could have learned it from Miss Katz, from agents or from anybody. I objected to the form of the question.

THE COURT: Did you see any phone calls made?

THE WITNESS: Yes.

THE COURT: Were you right there when the phone calls were made?

THE WITNESS: Yes.

MR. WALES: That has nothing to do with the fact. Mine was a valid objection to the form of the question, your Honor.

THE COURT: Seat the jury.

MR. WEINGARD: Judge, before we have the jury, since the jury is not present I have an application.

THE COURT: What is it?

MR. WEINGARD: Pursuant to 104 of the new Rules of Federal Evidence, I believe all questions concerning whether conspiracy is fully in effect at the time of those declarations, to which the witness has already given testimony had been made, is a proliminary matter and the Court is constrained to

rule upon it in the first instance.

THE COURT: You mean at this point in the trial I am to tell you whether there is enough evidence? You say Rule 104?

MR. WEINGARD: I believe so, sir.

THE COURT: No conversation is admissible until conspiracy is proved? How do you prove the conspiracy without conversations?

MR. WEINGARD: Judge, that is the problem. The prosecution may have to do it in circumstantial --

THE COURT: I'll read Rule 104 in light of what you said. I can't believe that a rule as impractical as that was incorporated into the Rules of evidence.

MR. WEINGARD: I would only suggest to the Court United States v. Pucco.

THE COURT: Seat the jury.

MR. WEINGARD: May I finish my thought?

THE COURT: Yes, please do that. Go ahead.

MR. WEINGARD: United States v. Pucco, the very point that I think 104 embodies at the present time was suggested by the Second Circuit.

THE COURT: All right. Are you through?

MR. WEINGARD: Yes, sir.

A I got in touch with Mr. Durso. I brought him the money.

Q Where did you bring him the money?

A Met him on 108th Street and 42nd Avenue.

Q How did you get the money?

A It was handed to me by Peter or Bebe, I don't recall which one gave me the money.

Q At the time the money was given to you, who was present?

A Peter, Bebe and Carmen.

Q Now, you were stating that you went to -- where -- to meet Mr. Durso?

A 108th Street and 42nd Avenue, at the Midway Bar, outside the bar.

Q Can you describe to us in as much detail as you can, what occurred?

A I gave Mr. Durso the money in my car and he said I'd receive a package of cocaine and if I didn't, was not happy with the quality of it, I could return the package and the money would be returned.

MR. WEINGARD: Your Honor, I must move to strike that on the basis of hearsay declaration against my client.

THE COURT: I gave the same limiting instruction

And Peter called Washington and I don't know what -- I wasn't present and I didn't hear what went onin the phone call --

Q Did Peter tell you whom he spoke to in Washington?

A No, not at this time.

Q Did he tell you the nature of the conversations with these people in Washington?

A Yes, he told me that someone -- they had a problem down there with the package, that someone either on the way down, Carmen, had cut it and left it in -- they said -- Chris's -- Chris Williams' refrigerator and then Chris had told Peter that Bebe either --

MR. WEINGARD: Objection, hearsay on violation of Sixth Amendment.

THE COURT: Again, these conversations are not chargeable against any one of these accused unless the Government proves beyond a reasonable doubt that the parties, or at least one of the parties who takes part in the conversation is a member of the conspiracy, after the Government proves the conspiracy is established and that it was during the term of the conspiracy and for the purposes of the conspiracy, and then it is chargeable only against that accused that you find

THE COURT: Will you whisper it to me in my ear, Mr. Barbella, so I know what I am doing?

(Record read.)

THE COURT: Strike out everything after "because."

Is that all right, Mr. Wales?

MR. WALES: Yes, your Honor.

THE COURT: All right, next question, Ms. Katz.

Q As a result of this conversation, what, if anything, was done?

A Well, at first, me and Chris --

MR. MONICA: I object to the words "as a result of." We don't know --

THE COURT: After this conversation.

MR. MONICA: That's right.

Q After this conversation, what, if anything--what if anything, occurred?

A Chris agreed. We spoke of the transaction that had gone down earlier.

MR. MONICA: Objection.

MR. WEINGARD: I move to strike on the grounds that it constitutes hearsay and violates the confrontation clause of the Sixth Amendment.

THE COURT: Is this the same objection you are making?

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is precisely where we are at this point in the People's direct evidence. And I would suggest to the Court that what the evidence has developed is that assuming the credibility of this witness that my client had withdrawn most forcibly from this conspiracy -- Apparently he dropped out of sight. He apparently had defaulted upon obligations which were due and owing to -- from what the evidence shows -- Mr. Durso. And to --

THE COURT: Is that an affirmative act? Not paying --

MR. WEINGARD: I would think, Judge, that his disappearance from the scene, his refusal to pay, and the variety of other bits and pieces of evidence that have come forward --

THE COURT: Maybe at the right time, if you can show me that this is an affirmative act, I will leave that to the jury as a fact question. Until that, everything I have said about Mr. Bebe holds.

Seat the jury.

MR. WEINGARD: Exception, sir.

Judge, may I have one thing on the record?

THE COURT: Hold the jury.

MR. WEINGARD: The other thought is that the limiting instruction that I am concerned about is not

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A He was tall, slender, white male, had longish hair.

Q And what, if anything, occurred?

MR. WEINGARD: Objection as to any conversation on the grounds that it constitutes hearsay, and on the grounds that it violates the confrontation clause of the Sixth Amendment.

THE COURT: Objection overruled.

If the jury finds that the Conspiracy as alleged in the indictment is established by proof beyond a reasonable doubt, finds that the -- this witness was a member of that Conspiracy, that this transaction was one -- or the conversation was one during the term of the Conspiracy, and advanced the purpose of the Conspiracy, then anyone the jury finds -- any accused the jury finds knowingly and willfully entered the Conspiracy, is bound by what this witness said or did.

MR. WALES: Yes. But the objection goes to what the other party said. There is no claim that he is a member of the Conspiracy.

THE COURT: Only what this party said or did.

Q Without indicating what the other party said, would you tell the Court and the jury what, if anything, you said or did?

courtroom.)

MR. WEINGARD: The witness also, sir.

THE COURT: You may be excused, Mr. Haralambus.

(Whereupon, the witness retired from the courtroom.)

THE COURT: Go ahead.

MR. WEINGARD: Your Honor, I think at this point that I must press on the record for a very, very confining and limiting instruction which would demonstrate from this point forward that none of the transactions -- that none of the actions, none of the statements made by any of the parties or any of the individuals denominated by this witness as co-conspirators, should in any fashion be held against Morton.

To begin with, the witness has just stated from his own lips that he and Chris Williams had worked out some sort of arrangement where they would go into partnership and they would divide the proceeds of whatever the Washington sales were, and that he would take care of Peter, his own cousin -- meaning the witness would take care of Peter, his cousin, from his own end, and apparently Williams was to take care of his own end. And it seems

(The following occurred in the absence of the jury.)

MR. WEINGARD: At this time I renew my previously made pre-trial application for a severance on behalf of Mr. Morton.

THE COURT: Motion denied.

MR. WEINGARD: I think the evidence --

THE COURT: Seat the jury.

MR. MONICA: If your Honor please, we have not yet received the daily minutes. Just wondered --

THE COURT: Here. Turn it over. Where is their copy? You'll get it.

(Jury present)

CROSS-EXAMINATION

BY MR. WALES:

THE COURT: Mr. Weingard, I don't mind you sharing part of the government's counsel table.

MR. WEINGARD: Whatever you wish me --

MS. KATZ: Mr. Wales asked to use that part of the table and I suggested to Mr. Weingard if he would sit over here.

MR. WEINGARD: The only problem is, in this position I won't be able to observe the witness.

THE COURT: Do whatever you can. You try to

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Very brief introductions, since they had sort of -- they knew of each other, but had never met.

Chris invited us over to his apartment ans we went up there.

Q Prior to this, had you ever given your cousin Harry Chris Williams' phone number?

A Yes, I believe I did.

Q Okay.

Would you continue describing what happened?

A Oh. We went up to his apartment and Chris had some cocaina there. And Harry and Chris discussed future business, you know, dealings either with cocaine or there was also a -- 50 pounds of grass mentioned at this time, that perhaps --

MR. WEINGARD: Your Honor, at this time I must raise an objection, sir, on the grounds of hearsay, violation of the Sixth Amendment confrontation clause.

THE COURT: Same ruling.

Do you want me to give the limiting instruction?

MR. WEINGARD: Yes, indeed, sir.

THE COURT: Obviously none of these accused were present at the time. The testimony given concerning conversation between the witness Haralambus and

Chris Williams and this witness can't bind any of these accused, unless the Government proves beyond a reasonable doubt that the conspiracy alleged in the indictment is established, that this was a conversation made during the term of the conspiracy and to further the cocaine business that is alleged in the indictment. And that at least one of the parties to the ocnversation was a member of the conspiracy.

If all those conditions are fulfilled, then it amy be chargeable against the accused if the Government proves beyond a reasonable doubt knowingly and willfully entered into the conspiracy.

Otherwise, it may not be used against any of the accused.

All right, Ms. Katz, you may proceed.

BY MS. KATZ:

Q Now, you went over, you said, yourself, your cousin Harry, to Chris Williams' apartment.

If you could, describe for us what occurred, what conversations took place, indicating who said what to whom?

A Harry said, told Chris that -- that he had -- he had access to some more cocaine and that he wanted to buy it. It was available.

here is what Mr. Haralambus said, "he is the one."

THE COURT: I beg your pardon, it is what she saw, too.

MR. MONICA: Haralambus admitted nobody took him, I asked him specifically, Did anybody remove you forcibly from that apartment?

If you are taking what she said, you have to believe that they took him physically from the apartment.

THE COURT: You miss the point of what he said after that, he felt that he had better go in order to avoid bloodshed in the apartment and he went along with them because he knew they wouldn't leave him and if he wouldn't go they would drag him. I think he used the words, that if he didn't go they would take him, is what I think he said.

MR. MONICA: Exception.

THE COURT: Read the testimony.

MR. MONICA: All right.

THE COURT: Mr. Weingard?

MR. MONICA: I make the same motion with respect to the other count.

THE COURT: Denied.

MR. WEINGARD: Your Honor, I renew my previous motion made on one occasion during the trial, and

that was an application for severance on the grounds of undue prejudice to my client bytrying the two theories that the Government has presented in their indictment together.

I know that the Court has been conscious in giving limiting instructions. Of Course I do appreciate that, but nevertheless I renew my application for a severance at this time.

THE COURT: No.

At the end of the trial I am more certain than I was at the beginning that this case should have been tried on all counts. The testimony involving the charge of extortionate means is inextricably intertwined with the testimony on the narcotic charges.

This is nothing more than a problem arising from the puchase price of the narcotics that were delivered.

MR. WEINGARD: While that may very well be true from the point of view of the sequence of events, from the position of the defendant there is overwhelming prejudice to him in having had both theories of the prosecution's case tried together.

THE COURT: It is nothing more than what every member of a conspiracy has when they are tried with the entire group.

MR. WEINGARD: He was never charged as a member of any extortionate conspiracy.

THE COURT: No, not extortionate conspiracy.

MR. WEINGARD: May I proceed on, then, if your Honor is denying that motion?

THE COURT: Yes, denied.

MR. WEINGARD: I have an application, your Honor, under Rule 29 for a judgment of acquittal at this time, and I would like to turn my attention to Count 9, which is the conspiracy count, and I will try to be as brief as I possibly can.

I would suggest to the Court that there is a variance between the pleadings and the proof in connection with this case, and that is that the pleadings charge one overall conspiracy between the months of January, 1974, and July -- the end of July, 1974, and I believe the testimony that has been elicited by the Government demonstrates that there were indeed more than one conspiracy, perhaps two, or as many as three or four conspiracies, and certainly none of those being the one which was charged in that particular count, Count 8 of the indictment as renumbered.

Of course I am citing such cases as United States versus Bynum, 485 F 2nd 490; United States versus Calabro, 449 F 2nd 865; United States versus Sperling,

506 F 2nd 1323; United States versus Traumonti, not yet reported, just a slip opinion at 2138, a 2nd Circuit case decided on March 7, 1975. All the other cases were 2nd Circuit as well.

I would draw the Court's attention to the fact that the witnesses with respect to a variety of bits and pieces of testimony referred to numerous different conspiracies, particularly the one which was formed between Haralambus and his cousin Mikedes, with the help of Durso and Fabella. At one point in time there was a reference to a conspiracy which was allegedly formed between Chris Williams, who remained down in Washington, and the witness Haralambus who went down to Washington along with Peter Mikedes, and the fact that they had formed their own cabal in order to supply Williams with quantities of heroin during the latter part of July, and to which my client obviously played absolutely no part or in which he played absolutely no part.

Your Honor, I think that in the line of cases I have cited to the Court, they clearly establish the fact that the Court is constrained, if indeed there is a variance between the pleadings and the proof, to dismiss the conspiracy count once there has been a demonstration that there are multiple conspiracies

as opposed to a single conspiracy as charged in that count.

THE COURT: I find no variance, I find that this is a single conspiracy as alleged and a single conspiracy proved. It is a conspiracy involved, or which centers around the cocaine received from the defendant Durso.

There are few conspiracy cases that have appeared before me that are as clearly defined as is this single conspiracy. Usually we have other deals, other partners, different groups. This was not so, this was clearly a consigned conspiracy, few in number, a single drug, all from one source, the source being Leonard Durso.

The defendants tried to show there were other sources, tried to prove other conspiracies, but the Government's proof was quite consistent along those lines.

MR. WEINGARD: May I proceed to the renewal of my motion, and that is on the grounds that the amendment which the Court permitted in this case, these are that Mr. Morton, violated Rule 7 and also the 5th Amendment -- the entire indictment that Mr. Morton is presently being charged on as amended violates the 5th Amendment to the Constitution.

THE COURT: Motion denied.

MR. WEINGARD: Thank you, sir.

MR. WALES: Your Honor, again I have an additional request, if your Honor pleases, if I may hand them up, I'm writing them -- excuse me --

THE COURT: Have you got a copy?

MR. WALES: No, I haven't, this was done this afternoon.

THE COURT: May I see it?

MR. WALES: Yes.

(Document handed to the Court.)

MR. WEINGARD: Your Honor, may we join in those requests made by various defense attorneys which are applicable to our particular client.

THE COURT: I beg your pardon?

MR. WEINGARD: I say may the request made by various defense attorneys which are applicable to our particular client, may we join in those various requests?

THE COURT: Sure.

MR. WEINGARD: Thank you, Judge.

MS. KATZ: Your Honor, I ask that defense counsel give me a copy of their requests.

THE COURT: Suppose you xerox it and give me the original.

so:

THE COURT: Do not tell me about--

MR. WEINGARD: I am talking with respect to the absent witnesses, Judge. I am telling the Court that the Government did not supply us--

THE COURT: I have never gotten requests to charge on absent witnesses without saying I am going to ask the Court to charge that the failure of this witness who had this information was not produced. Not a charge like this.

MR. WEINGARD: I think we're up to my No. 5, sir.

THE COURT: I beg your pardon?

MR. WEINGARD: I think we're up to No. 5.

THE COURT: Yes.

MS. KATZ: I object to the language of No. 5, although not the principle.

THE COURT: I consent to 5.

I deny 6. I may tell them that the only question about other conspiracies is that if they were unrelated conspiracies, then members of this other conspiracy couldn't possibly bind the members of this conspiracy.

You can argue that there were other conspiracies and you can argue along those lines, that certain

witnesses were members of other conspiracies and couldn't bind any members of this conspiracy.

Now, why should I charge on a single act?

MR. WEINGARD: Well, Judge, I think that as a result of the cross-examination of the witness Mikedes, there is a substantial question as to whether or not my client participated in the second alleged act at all.

If you recall, Mikedes indicated that the money was supplied to him through Chris, who obtained-- who obtained it from a Western Union office, after it was sent up, and that the money was then given by Mikedes to Haralambus, as I recall, and that Haralambus had the money and that Haralambus obtained the bad coke first and then subsequently-- or Richard Fabella brought the bad coke over first to their apartment and then subsequently at the Cue Motel Mikedes obtained the other coke and then it was sold.

If your Honor will recall, they indicated that between two and three thousand--

THE COURT: Is the evidence in this case evidence of a single act?

MR. WEINGARD: Judge, I submit that there is.

THE COURT: Which is the single act that there is evidence here?

MR. WEINGARD: The only single act of which there is evidence, according to my interpretation of the evidence after cross-examination of Mikedes, is the first transaction which took place sometime in February, where it's alleged my client came up with Carmine Bonita and they strapped the--

THE COURT: Is that a single act or is that a single transaction?

MR. WEINGARD: I believe it's a single act, Judge; I believe it's a single act.

THE COURT: Is that the only evidence of this defendant's entrance into the conspiracy?

MR. WEINGARD: I think the jury, if properly instructed, could find that that is the only evidence, particularly after the Mikedes cross-examination. I think your Honor--

THE COURT: All right. Will you point out some evidence of other acts by this defendant?

MS. KATZ: Mr. Mikedes also testified that as to--I believe it's actually the third package of drugs received, the second that was kept, that Mr. Morton was present, that it was tested, that he again indicated that he was satisfied, although this was not as good as the first package, that it was salable.

In addition, we have him raising money through the sale of pharmaceutical coke to pay off this debt.

We have him calling his wife and having his wife come down and give him money.

There is certainly more than one act in this enterprise, of which they can assume Mr. Morton's participation.

THE COURT: That is denied.

Declaration of co-conspirators. They have a Puco question, but Judge Feinberg, as I recall in Puco, suggested they have a hearing on the reliability. If I remember Puco correctly. I am not sure.

MR. WEINGARD: That is correct.

THE COURT: Why is there a request to charge?

MR. WEINGARD: Because I believe the jury should be instructed along the lines indicated in Puco.

THE COURT: All right. I will grant it.

MS. KATZ: As to this language, your Honor--

THE COURT: I won't use that language.

I will grant No. 9.

MR. MONICA: Apparently--

MR. WEINGARD: Judge, there is still No. 10 on my list.

THE COURT: No. 10?

MR. MONICA: That he must have known that before.

MS. KATZ: I think you have already chrged that.

THE COURT: I think I did, but I will say it again.

MR. WALLS: I have no further exceptions, your Honor.

THE COURT: What is that Dean's apartment, Dean, what is his name?

MS. KATZ: Varvariogos.

THE COURT: Anything else?

MR. WEINGARD: I have some exceptions, Judge.

I formally except to all of the requests which the Court initially denied and which were submitted by me to the Court.

THE COURT: All right.

MR. WEINGARD: And in addition to that, Judge, I must except to that portion of your Honor's charge which dealt with your statement that it was a question for the jury to determine factually whether any other witnesses besides Haralambus was an accomplice, indicating that that was a question of fact.

I suggest and request that the Court must

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charge it is a matter -- your charge is a matter of law that Mikedes was indeed an accomplice in participating --

THE COURT: Mikedes? I was thinking of Cathy Ross and Rudinski when I said that. I overlooked Mikedes.

MR. WEINGARD: I believe you must charge Mikedes as an accomplice as a matter of law.

MR. WALES: And Haralambus too, then?

THE COURT: That is what I forgot, I forgot about Mikedes, that is the one. Now the reason I did that is because there was the possibility, the small possibility that Rudinski and Ross were also accomplices because I think you argued that. And that is why I said that I thought that was a fact question.

MR. WEINGARD: I would agree with the Court's interpretation.

Your Honor, I think you also agreed to charge defendant's Request No. 10, indicating that none of the evidence concerning the extortion of credit extension was to be held against Morton, and I know your Honor intended --

THE COURT: I will charge it, I intended to.

MR. WEINGARD: You intended to.

THE COURT: Yes.

MR. WEINGARD: Will you be kind enough to do that.

I have one other concern. Your Honor indicated during the course of his charge that when a question is propounded to a witness and the witness answers no, I believe the impression you left with the jury is that the jury is bound by that answer.

THE COURT: I said that they cannot assume that the fact is true.

MR. MONICA: It is a fact question.

THE COURT: That is right.

For example -- well, it was done any number of times, but when the question is asked: "Isn't it true that so-and-so did so-and-so," and the witness answers, "No" -- and as a matter of fact I charged that during the trial, too --

MR. WEINGARD: Yes, indeed, sir, but it is my position, and I believe it is a correct one, that the jury has the right to observe the witness's demeanor at the time of the answer and may find that the witness is not telling the truth when he propounds a negative answer to a question, so I would ask the Court to so charge.

THE COURT: No, I won't, I decline to so charge.

Mr. Haralambus, he said it wasn't for the purpose of punishing the defendant for non-repayment.

But that is a question of fact before you.

The Government has submitted evidence showing the other position.

So it is important in count 4, but in counts 1 and 3 it is surplusage, so therefore it is surplusage in count 2.

The jury is excused.

MR. WEINCARD: May I be heard, your Honor?

May I respectfully say that it has come to my attention as recent as a moment or two ago when your Honor handed over the original indictment I noticed that there was an amendment on the face of the indictment relating to my client's name as had been argued before your Honor approximately two weeks ago today.

THE COURT: Yes.

MR. WEINCARD: While the issue is not clearly decided in this circuit, there are some circuits that say in essence that that is impermissible, that is writing on the face of the indictment itself the amendment which the Court permitted, that that is violative of the Fifth Amendment since that is no

longer the indictment which had been handed up or approved by the grand jury in connection with the case.

THE COURT: And you are talking when you say "amendment," the name William Morton instead of John Doe, also known as Bebe, and I wrote that across the face.

MR. WEINGARD: I understand that. but it just came to my attention this very moment when you showed it to us in connection with the explanation.

THE COURT: As a matter of fact, to make sure there is no question about it, I will endorse my initials on it because I forgot to put my initials on it.

MR. WEINGARD: Right.

I would just indicate to the Court that it is still apparently an open question in this circuit, and I would raise again the Fifth Amendment argument that I raised earlier, I believe two weeks ago today, and I would ask the Court to take notice --

THE COURT: I understand. You are preserving this record.

MR. WEINGARD: Yes, thank you, sir.

THE COURT: Now I intend asking the jury as to whether they want to suspend at this point and

(At 5:35 p.m. the following occurred in open court without the presence of the jury:)

THE CLERK: Court Exhibit 18 for identification, note from jury.

THE COURT: Seat the jury.

(The jury took its place in the jury box.)

THE COURT: Madam Forelady, are you saying by the first question, "Can the jury suspend until Monday," that you feel that further deliberations today will be fruitless?

THE FORELADY: I think so.

THE COURT: Do the rest of the jurors feel the same way?

(Members of the jury indicated in the affirmative.)

THE COURT: You feel if you rest and come back Monday you would probably arrive at a verdict?

THE FORELADY: Yes.

THE COURT: All right.

What time do you want to start on Monday?

THE FORELADY: 9:30.

THE COURT: 9:30?

THE FORELADY: Yes.

THE COURT: All right, good enough.

We will suspend at this point.

Again, when we suspend during deliberations, it means you have to impose a lot of self-discipline and make up your mind when you leave here that you will just say nothing, nothing to anybody, and make certain that you insulate yourselves against any possible outside influence and not to discuss it with anybody or even mention it to anybody, and when you reassemble on Monday, just as you did today, don't discuss anything. When you are all here, and I will try to be prompt on time and make it exactly 9:30, then when everybody is here, and if you are here we will even start before, and again you will find the same menu, we can't vary the menu, we have a thousand of them printed so that is the only menu we have, and you will make your choices for lunch, and lunch will get here about noontime.

All right, the jury is excused until Monday.

I will see you at 9:30 and have a nice weekend.

MEMBERS OF THE JURY: Thank you, too.

(At 5:40 p.m. the jury left the courtroom.)

THE COURT: Let me say this: We have had experience with our juries going over every case individually, and I have had some jurors where I could tell exactly where they were in the deliberations by

the testimony that they ask for. I had one case, and I can't remember the name right now, it was a multi-defendant count and multi-defendant case with different defendants charged in each count, and this jury first asked for all the testimony on this count and I had to go all through it, and I think that took a couple of days, and I had to come in on Saturday to take a verdict. I forget the case, but it was in the winter.

THE CLERK: I think we stayed late, too.

THE COURT: Oh, yes.

THE CLERK: Two nights we stayed late.

THE COURT: I just mention that, they went over every count just as they were instructed, they take their oath seriously, and I think that is all to the good.

MR. WEINGARD: Your Honor, of course I agree with everything your Honor has said. However, I must register a protest as to an adjournment between today and Monday without sequestration or without some sort of supervision of this jury.

While I know your Honor has carefully instructed them as to the responsibilities of the jurors not to speak to anybody about this case, I think it is highly improper to have a two-day adjournment in the throes of deliberation and where deliberations have

gone on over a period of some two days and then to permit the resumption of those deliberations on Monday.

THE COURT: I have sequestered I think only two juries in the fifteen years I have been here and that was only because they were highly publicized trials and the newspapers told me that they would print articles about it. Now no newspaper cares about this case, so there is no chance of publicity on this one.

MR. WEINGARD: That is not the basis for my --

THE COURT: That would be the only reason.

MR. WEINGARD: (Continuing) -- for my exception.

THE COURT: If we can trust the jurors to obey the Court's direction overnight, it is the same thing for the weekend. It is just a matter of time, the principle is the same. If I cannot trust them to disband overnight and come back without having talked to anyone about it, then we should not do it at all, but it has become the common practice in this Court --

MR. WEINGARD: Nevertheless, I must register my exceptions, sir.

THE COURT: Sure.

All right, see you at 9:30. I expect you all to be here at 9:30.

MR. MONICA: Have a good weekend.

THE COURT: Good night.

* * *

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DEFENDANT'S REQUEST NO. 6

SINGLE CONSPIRACY REQUIREMENT (COUNT 8)

Should you find that the government has failed to prove, beyond a reasonable doubt, the existence of only one conspiracy as charged in Court 8 of the indictment, you must find the defendants not guilty. Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

U.S. v. Bynum, 485 F.2d 490, 495-497 (2d Cir. 1973)

U.S. v. Calabro, 449 F2d 885,894 (2d Cir. 1971)

U.S. v. Sperling, 506 F.2d 1323, 1341-1342 (2d Cir. 1974)

U.S. v. Tramunti, -- F.2d -- slip op. at 2138 - 2141 (2d Cir. dec. March 7, 1975)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

- against - 75-CR-177

LEONARD DURSO, RICHARD FABELLA and WILLIAM NORTON,

Defendants.

----------X

United States Courthouse
Brooklyn, New York

September 19, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

(Sentences)

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Official Court Reporter
U.S. District Court

EMANUEL KARR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
FEDERAL COURT HOUSE. ROOM 362
225 CADMAN PLAZA EAST
BROOKLYN. N. Y. 11201
TEL. ULSTER 2-7105-7106-7107

and the child is in turn attached to him. I think you have seen the letters of the wife and the letters of my client's possessive mother, which are before the Court at this time, and a letter from a sister, a Roman Catholic sister, who tutors the child and educated the child. Indeed, there is a very close, very real family relationship with tremendous interdependence on the part of the child towards the father and in turn the father towards the child.

My client will never appear before a court of law again, I can say that without reservation, Judge, if this Court can see fit to probate his term, and I most sincerely ask it from the Court at this time.

THE COURT: No.

I think a great deal of what you say I agree with. I think there is something very attractive about the defendant. He has a very stable and supportive family.

I have read all the record, but this is a serious offense. He did deal in cocaine and the jury found that he dealt with cocaine, and I don't think that anyone that makes a business of dealing in cocaine for however brief a time is entitled to probation.

William Clark Morton, the jury having found you guilty on counts seven and nine of the indictment, I sentence you to the custody of the Attorney General or his duly authorized

representative who shall choose a place of confinement for a term of two years. In addition thereto, I will impose a special parole term of five years on each count, said terms to run concurrently.

I might say that both my conferring Judges would have given a stiffer term than I handed out on all of these defendants, and I don't know whether it is because I am getting soft or whether it is because I heard the case and probably know it better than they do, but one would have imposed a sentence of seven years plus eight years special parole, the other six years and five years special parole term.

MR. WEINGARD: In connection with my client?

THE COURT: Yes, they recognize that this defendant played a lesser role than the other two, and of course he was free of any suggestion of violence. There is no suggestion of violence in his background.

I think, as I say, he presents a very stable background and I think he has a wife who fully understands him. He is very fortunate to have that.

MR. WEINGARD: Your Honor, may I be heard with respect to my request that the Court impose this sentence pursuant to 4208(a) Title 18, so that in the event --

THE COURT: I will not do that. First I impose it only in long sentences, secondly, I am imposing it in fewer and

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

THE UNITED STATES OF AMERICA,

- against -

75 CR 177

BEBE MORTON,

Defendant.

----------x

United States Courthouse
Brooklyn, New York
July 8, 1975

B E F O R E :

HON. JACOB MISHLER, Chief Judge

A P P E A R A N C E S :

DAVID G. TRAGER, ESQ.,
U.S. Attorney

BY: MARSHA KATZ, ESQ.,
Assistant U.S. Attorney

JEFFREY WEINGARD, ESQ.,
Attorney for the Defendant

HARRY RAPAPORT, C.S.R.
Acting Official Court Reporter

AFTERNOON SESSION

THE CLERK: Criminal Motion, United States of America against Bebe Morton.

MR. WEINGARD: My name is Jeffrey Weingard of the firm of Weingard and Broundy, 401 Broadway, New York City. And I am here on behalf of William Morton who apparently -- and I will lay emphasis on the word apparently -- has been indicted under Indictment number 75 CR 177.

As your Honor is, I am sure, aware, I have been just recently retained in connection with this case, having filed my Notice of Appearance as recently as yesterday. My client retained me as of Thursday of last week and I am led to believe by the Prosecutor, as well as my client, that your Honor has directed this case to proceed to trial as a date certain, the 14th of the coming month, the 14th of July.

I am sure the Court understands that in light of your Honor's direction, that I have but six short preparation days, interrupted by weekends and holidays, during the course of which I am obliged to prepare my client's case. And I have several applications which I directed towards a severance, a continuance, the right to join in the application previously

made by other co-defendants, as well as one application directed to the legal sufficiency of the indictment itself as an instrument through which my client can be brought to trial.

THE COURT: Let me say this: If this is an extended argument, you will have to wait until I answer the jury's request for testimony. I will not hear extended argument at this time. So, I don't know how long it would take, fifteen minutes, twenty minutes, a half hour. I will try to listen to the argument after I read the testimony that the jury wants.

MR. WEINGARD: Certainly. All right, sir.

(Whereupon, unrelated business takes place.)

THE COURT: Continue from where you left off.

MR. WEINGARD: Yes.

I believe before the Court suspended oral argument I was indicating to you, sir, that my client had been arrested in connection with this particular case where he had been supposedly indicted under the name of, quote, John Doe, a/k/a, quote, Bebe, close quote.

On June 2, I believe of this year, although the case had been pending in this court for quite

some while, he was arrested in Maryland in what I am led to believe his home, and he was arrested on a warrant issued on the indictment -- and I will get back to that in a few moments.

He was brought back after having waived removal from Maryland. And I might note for the record -- and this is the information I have -- he was not given the assistance of counsel at that time, although the Magistrate, I assume, properly advised him of his right to have counsel. Mr. Morton did not have an attorney at that time, nor was court appointed counsel assigned to him.

I am informed by my client he had no knowledge at all what it meant --

THE COURT: What difference does it make? Let's assume he was deprived of his right to counsel and he was brought here and he pleaded here. What difference does it make?

MR. WEINGARD: I think it makes a very substantial difference based on our application for a continuance and based on our application for a severance, Judge. Part of our application for a continuance is premised on the fact that Mr. Morton, having been arrested on the 2nd of June and not

having the assistance of counsel until the earliest, a week this past Friday, and another attorney appeared before your Honor and indicated the willingness to appear on Mr. Morton's behalf, provided he had an opportunity to prepare the case. And your Honor indicated at that time he had only until the 14th without any further adjourned dates so that that attorney had to withdraw.

And I think Mr. Morton is deprived of the effective assistance of counsel, your Honor, And it has an interesting ramification in the contents of this particular indictment.

Your Honor will note the indictment does not charge William Morton. It charges John Doe, a/k/a Bebe.

THE COURT: They have to prove that Bebe is, in fact, Morton. I don't see the difficulty there.

MR. WEINGARD: One of the arguments I intend to make to the Court after I get done with some of the preliminary ones is that that indictment as it is presently constituted, does not constitue an indictment of my client under the Fifth Amendment and if I may, I may reserve that argument until I get through with the basics,

First, I would like the Court's permission to join, since I do not have the time in light of the Court's mandatory trial date of the 14th to prepare written motions at this late juncture to join in those motions already made on behalf of the other co-defendants, originally, by Leonard Dorso (phonetic spelling) and submitted by his attorney, Mr. Wells (phonetic spelling), I believe, and which were joined in by the other co-defendants.

I would ask the Court -

THE COURT: I assume you made the motion and it's the same ruling, the motion to sever the distortion charges from the narcotics charges. I find that it's the same transaction, same evidence. I wrote on this and I believe at length and I find no difficulty in their case as yours.

MR. WEINGARD: You wrote on it with respect to the fact that the counts should not be severed from each other because one charges extortion and the other charges narcotics transaction.

In addition to making all of the applications, which you are apparently allowing me to make at this point, and abiding by your Honor's ruling,

vis-a-vis whatever the rulings were on the Dorso application, I would like to ask the Court to consider an application for severance on still yet another ground insofar as it relates to my client who was not represented when these applications were initially made, and that is an application for severance based on just the sheer prejudice which will inure to my client if he is tried along with other co-defendants whose names are Dorso and Fabella (phonetic spelling), as well as Christopher Williams who is also originally named in connection with this case.

Judge, first I would point out, as the Court recalls, there are Hobbs Act (phonetic spelling) violations consisting of approximately six counts involving just Dorso and Fabella. The first six counts of the indictment, wherein it is alleged in essence, that those two men placed pressures and physical threats and psychological threats --

THE COURT: Excuse me, we have a verdict in the other case. You may continue, but see if we can round up Mr. Ritchie (phonetic spelling).

MS. KATZ: I'm sorry, your Honor?

THE COURT: I don't know how long it will take.

I will take the verdict as soon as the attorneys are here.

MR. WEINGARD: In essence, the first six counts charge Hobb's Act violations dealing with what we consider totally unrelated actions on the part of two of the co-defendants as compared with my client, Mr. Morton.

THE COURT: Let's assume the six counts, charging the use of extortion means to collect an extension of credit were not in the indictment but that Bebe was nevertheless joined on the narcotics counts with Dorso and Fabella --

MR. WEINGARD: Yes, Judge.

THE COURT: Don't you think I would allow evidence to show the collection of the price of the sale of the narcotics to come before the jury to show the business?

MR. WEINGARD: There is a vast difference between what your Honor might theoretically allow as against Dorso and Fabella --

THE COURT: So, what you're saying, even if the extortion counts were out of the case, you would still move to sever Bebe or Morton from the narcotics counts against Dorso and Fabella?

MR. WEINGARD: I don't necessarily take that position, Judge, but I tell the Court you would have far less flexibility in permitting evidence to commit so called conspiratorial acts on the part of the other co-defendants if the extortion transaction counts are not in.

If I may point to the last count of the indictment, I think the Court will understand my point. The last count of the indictment, count nine, charges the conspiracy my client -- again, not by name but John Doe, also known as Bebe -- Dorso, Fabella, Christopher Williams and the apparent witness, Hormalis (phonetic spelling).

And that particular charge involves an allege conspiratorial act which took place between Februa 1974 and July 1974.

Now, if your Honor would turn to count one and to count six in the indictment, you will notic that there are transactions which involve extortio collection practices on March 20, 1974, and on February of 1974, both within the scope of that particular alleged conspiratorial situation.

But, if you look at the other counts, two, three, four and five of the indictment, you will

notice that there were a variety of allegations concerning the extortinonate means which take place without the scope of the alleged conspiracy.

And what I am saying to the Court, if the Court would permit that type of evidence which is from what I am led to believe from the Government's memoranda submitted to the Court, the real threats, the actual physical beatings, the alleged recorded conversations which took place between Dorso, Fabella and Hormalis, to come into evidence in a trial where my client was a defendant on unrelated charges, if you will, and where the conspiracy was already terminated, that there would be a tremendous overflow of evidence on behalf of my client --

THE COURT: I have to suspend. I have a verdict. We will continue this after the verdict.

MR. WEINGARD: I understand.

(Whereupon, unrelated matters are taken up by the Court.)

THE COURT: You said -- you were at a point where you said that just because some of the counts involving extortion -- because two of the counts go beyond the term as set forth in the conspiracy that they would not normally be admissible in the

trial against Dorso and Fabella? Is that what you're saying?

MR. WEINGARD: First, the four counts go beyond the term of the conspiracy, your Honor.

THE COURT: Firstly, let's see what the conspiracy says.

MR. WEINGARD: It's count nine. It says on or about February, 1974, and July, 1974 --

THE COURT: On or about?

MR. WEINGARD: Yes; and between.

THE COURT: You think on or about August 8th is beyond the term of the conspiracy?

MR. WEINGARD: I think the Government has take that position, yes, Judge.

THE COURT: You think August 11th is beyond the term of the conspiracy?

MR. WEINGARD: Yes.

THE COURT: The termination is fixed on or about, not the end of July.

MR. WEINGARD: Judge, if the Government wishes to indicate that this particular transaction is part and parcel of this alleged conspiracy as against my client, I would like to hear that. I don't think that is the theory the Government is

advancing.

THE COURT: This is a substantive charge and it doesn't name your client. But, if evidence of transactions in a conspiracy that was alleged to terminate on or about July include August, I would, at the very least, give that to the jury as a fact question as to whether it came in terms of the conspiracy.

MR. WEINGARD: With all due respect, this isn't a situation where the Government is claiming a variance between the pleadings and the proof offered at trial where the Court can say the jury is entitled to be instructed on the law of variance between pleading and proof.

THE COURT: They claim it was not at variance.

MR. WEINGARD: Yes.

I would say to your Honor it was not a variance in that type of a situation.

However, where the pleading itself contains a specific factual allegation of an extortionate transaction which occurs on a date beyond the dates claimed to be the perimeter dates of a conspiracy outlined in the very instrument --

THE COURT: Let me ask you another question

quite clearly and apart from that.

MR. WEINGARD: Yes.

THE COURT: Let's say I find the conspiracy ended July 30th, but there was proof offered that one of the parties demanded payment for a shipment of narcotics that took place before July 30th. Don' you think I would allow it?

MR. WEINGARD: Your Honor might allow it but the question is --

THE COURT: What do you mean might? I would I would allow it.

MR. WEINGARD: The question is: Would you allow it as against my client who is not charged with extortionate means or --

THE COURT: I said all Mr. Dorso or Mr. Fabella said, "Would you please pay for the narcotics which was delivered to you back in June or July," and that proof came in.

MR. WEINGARD: Judge, the question would have to be whether or not those hearsay declarations were made in furtherance of a conspiracy.

THE COURT: They are not hearsay declarations.

MR. WEINGARD: Are you talking about the declaration of the co-conspirators?

THE COURT: Yes, the demands for the money, the payments.

MR. WEINGARD: Which are declarations of co-conspirators, if you wish.

THE COURT: Some of the cases call them verbal acts. I don't even call them verbal acts.

MR. WEINGARD: If it's the type of verbal acts we are talking about under cases as U.S. v. Pucco, (phonetic spelling), I think what your Honor would be constrained to do before you permitted the jury to hear that evidence is to first find out several things: One, whether or not my client was a participant in the conspiracy separate and apart from those declarations; whether the conspiracy was still in effect at the time those declarations were made and whether or not they were made in furtherance of the conspiratorial agreement.

THE COURT: Mr. Weingard, if that wasn't established at the end of the Government's case, I don't have to go into that. That's the first question the jury must determine. If your man wasn't a member of the conspiracy, forgot everything else.

MR. WEINGARD: It is my understanding under the

724.

Federal Rules of Evidence that particular question would be an appropriate question for a judicial determination prior to submission to the jury. I believe Rule 103 and 104 -

THE COURT: Go beyond United States v. Geeney. (phonetic spelling.)

I also instruct the jury that they must beyond a reasonable doubt that the defendant knowingly and willfully entered into a conspiracy before they can consider any kinds of acts, act committed during the term of their conspiracy or acts committed after the conspiracy is established. There are some post-conspiratorial acts admissible to show the existence of the conspiracy.

MR. WEINGARD: Your Honor, I would agree if that is circumstantial proof which bears upon the existence of the conspiracy and not in the form of verbal action or declaration by alleged co-conspirators. There may be a way the Government can proceed to obtain that as evidence in the case, but what I am saying to the Court is that on all the facts as I understand them here, you have allegedly, my client, who is a supposed purchaser, not a seller, a purchaser of some cocaine from Harry Hormalis, the victim; and

you have the alleged partners of Harry Hormalis beating him up, physically administering a serious beating at the time my client is not even alleged to be any longer a participant in the conspiracy according to this instrument. And those particular beatings are serious enough, according to what the Government informs me or tells me, so that several operations had to be undergone by Harry Hormalis.

Then I tell the Court if that type of evidence permitted against my client is highly prejudicial, suspiciously prejudicial so that the Government has recognized the nature of its prejudice and on its own application as contained in its memorandum submitted to the Court on the original application before the Court agreed to several idioms.

THE COURT: I never made that agreement. Maybe the --

MR. WEINGARD: Yes, the Government and I will read you exactly what the Government said.

The Government said as to Mr. Williams, the Government agrees that Mr. Williams would be unduly prejudiced, and then goes on to indicate he was not involved in the extortion counts nor the substantive counts and only the conspiracy counts.

But, the Government in its memoranda to the Court indicates that Mr. Williams was in exactly the same situation vis-a-vis Fabella and Dorso and Hormalis as my client. He was a purchaser of alleged cocaine.

And I will tell the Court, if the Government assumes a position in its memoranda which I assume the Court adhered to, according to your decision there was a footnote dropped where the Court recognizes the undue prejudice and the Court points out you will sever Williams, I would assume the same circumstance is applicable based on the same repres ntation by the Government or the same recognition by the Government that there will be undue prejudice due to my client if he was forced to go to trial with Fabella and Dorso and Hormalis, the primary witness --

THE COURT: All I say in the footnote, the Government consented to the severance of the charges against Williams.

MR. WEINGARD: And indeed the charges have been severed.

THE COURT: I don't comment on the reason.

MR. WEINGARD: I assume, your Honor -- if I

am incorrect, I will withdraw the statement - but I assume your Honor abided by the statement put forth by the Government.

THE COURT: I don't care what reason. If the Government says we would like to sever against Mr. X and if the defense says all right, I agree with it. I don't care if it's erroneous or what. Sometimes they have their own reason for severing.

Is Williams going to be a witness?

MS. KATZ: At this time I am not prepared to make that known. There were certain reasons at the time of that statement and I would make it known in chambers to the Court, that persuaded me to make the statements I did.

THE COURT: I will not hear any ex-party statements.

MR. WEINGARD: The reason given, your Honor, is that the evidence on the extortion transaction, just as the evidence against my client, will be unduly prejudiced against Williams and I told the Court on all the facts my client is alleged to have been a purchaser and so is Williams. Both are alleged to be purchasers from Hormalis.

THE COURT: All you're saying, you were discrim

inated against because you were in the same position as Williams. They consented to sever against Williams and not against your client.

Isn't that the argument?

MS. KATZ: May I make one statement?

THE COURT: They may have been wrong in severing Williams. I don't go into the reason.

MR. WEINGARD: What I am saying, they were correct in severing Williams and I am saying there was indeed a valid reason for that severance regardless of what has subsequently developed.

THE COURT: I don't know whether they were correct or not, and I tell you this, it is no argument to sever Morton. Morton has to stand on its own.

MS. KATZ: May I make one statement for the record?

Mr. Morton, unlike Mr. Williams, is named in count seven and eight of the indictment.

THE COURT: Why didn't you name Williams, too, in count seven and eight?

MS. KATZ: As your Honor has said, there are various reasons why one doesn't do what they did. But, at the time certain decisions were made that I

might regret or not regret standing here in this position today. Nonetheless, the Government must live with those past decisions.

THE COURT: You know you can prove substants crimes were committed in pursuance of the conspiracy while the defendant was a member of the conspiracy and under that theory, you could have joined Williams on those counts.

Why don't you tell us whether he will testify or not? What is the big secret? The defendants know it, you know it and only I don't know it.

MS. KATZ: Honestly, I don't know it, your Honor. At the time of the severance, there was a belief on my part that Mr. Williams might cooperate, and in that cooperation, he would testify at the trial. It is my belief standing here today that the likelihood of that is not very good.

MR. WEINGARD: Judge, in light of what the Government just said, one of the primary arguments usually advanced by prosecutors, to wit, that there will be an additional trial and an expense if there is a severance, is rendered meaningless. There must be, from what the prosecutor has indicated to the Court, at least the probability of another trial at

which testimony of the conspiracy must come forward.

THE COURT: You just convinced me that maybe you ought to rejoin Williams.

MS. KATZ: Your Honor, I would love to rejoin Mr. Williams.

THE COURT: That's how you ought to do it.

That will satisfy Mr. Morton too because then, he knows he will be treated as equally as Mr. Williams is.

MS. KATZ: The Government will be happy to rejoin Mr. Williams.

THE COURT: Who is Mr. Williams' lawyer?

MS. KATZ: Mr. Ed Kelly of the Legal Aid Society.

THE COURT: Ask him if he is ready to come in and try the case on Monday. He wouldn't want anymore time because he doesn't play with these cases. That's the way to do it.

MR. WEINGARD: With all due respect, it really doesn't reach the merits --

THE COURT: The merits are this: It's the same transaction. The mere fact that there is also an extortionate charge against the two others is no answer because I can instruct the jury quite care-

fully. I can give them a memoranda of verdict, points, to the different charges against Fabella and Dorso that don't apply to the others, against the others. And my experience is that jurors do look at each case individually. And I am not inclined to try two cases and you can't tell me because Williams is severed, there will be two trials. I am not convinced of that. I know I have got one trial that is to start Monday. That one I have. And it may very well be if I severed your man and Williams was disposed of, I have two trials, but one we would have done. I don't see it. Every defendant likes to be severed from his co-defendant.

First of all, it means so much work for the United States Attorney that might be discouraged, they may never try that defendant. And it delays the defendant and it can do you no harm despite of what is said about speedy trials. I have very few defendants begging me and pleading me for an early trial. All they do is ask for adjournments, severances, delays.

MR. WEINGARD: May I be heard, sir?

THE COURT: Sure.

MR. WEINGARD: Okay.

Judge, the Government has indicated to you that the probability is that Williams indeed shall be tried, that he has not cooperated, that is not cooperating and apparently, he is not pleading or is going to be tried at some point. There will be a proceeding pending against Williams apart from the one going forward on the 14th.

THE COURT: Ms. Katz may have made an error. Usually they don't sever until they plead. They severed first.

MR. WEINGARD: I would like to believe that Ms. Katz severed for reasons given to the Court in the memorandum. I would like to believe the prosecutor advanced legitimate reasons before the Court when it indicated the grounds advanced, your Honor.

And the grounds advanced was on a valued judgment. And after a reading of the indictment, the prosecutor's office determined there maybe prejudice due to Williams.

THE COURT: You maybe giving the prosecutor's office more credit than they deserve.

MR. WEINGARD: Perhaps I do.

THE COURT: And it wasn't the basis on which

I granted a severance. I granted a severance only on consent. I didn't look at the reasons and I don't know the reasons.

MR. WEINGARD: As I indicated to the Court, there are other reasons for my application for continuance of severance for a variety of grounds.

First off, Judge, I have no way of adequately preparing this case in the few short days remaining before the commencement of this trial.

THE COURT: Let me answer that.

That's most unfortunate. At the very latest this defendant was told by me -- he might have known he had a charge against him when he was arrested on June 2nd. He might have even known about it when the indictment was filed. I have no way of knowing it. But, at the very latest on June 6th, he was told by me, if you can't afford a lawyer, I will get you one. I will assign very competent lawyers or a competent lawyer who can be ready on July 14th.

He told me he had to go out and borrow money to obtain a lawyer. I told him lawyers are very expensive, he doesn't have to borrow money to hire a lawyer.

He told me he wanted his own lawyer.

I said it's all right, but you understand this trial starts on July 14th. And whether you have a lawyer or not, you're going to trial.

He said I understand.

I then set it down for a date when he was supposed to come in and tell me he had a lawyer.

He came in and said he still doesn't have a lawyer and he said he is about to hire a lawyer.

And I said, don't you remember what I said to you? Whether you have a lawyer or not, you're going to trial. And don't come in the Friday before the trial with a lawyer and have the lawyer tell me that he can't prepare the case. That's your fault and not mine.

He said I understand.

Then, he came in with a lawyer and the first application the lawyer made was for an adjournment. I said denied.

And then another lawyer comes in and makes apparently the same application.

He didn't make this as predicted the Friday before, he makes it the Tuesday before.

Now, if you read United States v. Maxim (phonetic spelling), you will understand what the

Courts are saying. We have a very heavy schedule. We are under terrific pressure. We must set these cases down and get them tried. We will not tolerate delay of any kind.

If a defendant delays the trial, if he comes in unprepared after being fairly warned, that's his problem. We decided it was no longer the Court's problem. We gave him the opportunity of being prepared.

And this defendant was told repeatedly and in the most direct language, because I had United States v. Maxim in mind and I pointed out to him that's what the Courts are saying to lawyers.

Don't take a case if you can't start the trial when it's fixed by the Court. The Court's calendar will not be disrupted because lawyers cannot be ready.

Recently, additional support was given by the Court of Appeals when Judge Bartel fined a lawyer one thousand dollars for not telling him he was engaged elsewhere and disrupted his calendar.

That's the way we feel about it.

MR. WEINGARD: I can well understand the Court's calendar pressure and I am not unmindful to it and

I am not in anyway demeaning the Court's calendar pressure. And at the same time, I think there must be some sort of balancing between the defendant's abilities to retain counsel and prepare his defense and to seek at least from his vantage point and certainly my vantage point objectively speaking a reasonable continuance with a view towards adequate representation.

THE COURT: In my humble opinion, this defendant wouldn't have gotten a lawyer more than one week before the trial if he had six months to prepare.

MR. WEINGARD: My experience with my client is very different. If I may, I would like to outline --

THE COURT: Save your time. I will make my matter with you as I made it with the gentleman who came in on Maxim (phonetic spelling), and that is that a case is set for trial. The defendant has adequate time to retain counsel and prepare a case. He does nothing about it or he indulges in fruitless efforts, that's his problem and that's all there is to it.

MR. WEINGARD: For the purposes of this record,

since this is an oral application, an outline of what my client's efforts as I understand them were --

THE COURT: Sure.

MR. WEINGARD: To begin with, as you pointed out he appeared before your Honor on the 6th for the purposes of arraignment, having been arrested in Maryland on the 2nd of June, 1975.

I would tell the Court he did not have counsel according to his version to me while he was in Maryland and he waived removal to the State of New York without having adequately conferred with counsel. He did attempt to contact a lawyer he knew in the Washington, D.C. area who was unavailable to him at that time. But, apparently, he signed his waiver and came to New York.

THE COURT: Was he offered counsel?

MR. WEINGARD: I have no way of knowing, sir.

THE COURT: That's very important, sir.

MR. WEINGARD: I must presume the Magistrate informed him of his right to have free counsel if he was an indigent.

But, Judge, my client doesn't purport to be an indigent.

THE COURT: I made it clear to your client he

didn't have to go borrowing money. I assigned counsel to people earning $10,000 a year, to people owning substantial property. If they can't afford it, they are entitled to assign counsel. And I made it plain to him.

MR. WEINGARD: I am talking about the Magistrate Judge.

But, the point is that he did make and there were legitimate grounds for him having refused removal as I will point out in my final argument in a few moments.

Nevertheless, he came up higher and subsequentl your Honor advised him, I am sure in the language you indicated. But, he was making every effort at that time to retain and obtain New York counsel. And he had spoken with several lawyers with a view towards marshalling his assets with a view towards obtaining an attorney. And while the Court offered him free counsel, you will understand, I am certain, the defendant's reluctance to take on a lawyer assigned by the Court when he feels aided by retained counsel, someone referred through friends or family, whatever the case maybe.

THE COURT: That puzzles me, frankly.

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MR. WEINGARD: It maybe a puzzlement, but nevertheless, it is a natural reaction of human nature. And I think everybody who is a private practitioner as I do and who, at the same time, finds himself in the State Court on the 18B Panel, the three indigent panel, you see very often a family coming forward willing to pay to another attorney what would be your normal retained fee and bringing another attorney in the case while your skill maybe as fine as his. Nevertheless, that happens. Everybody recognizes that.

The point I wish to make, my client was not, in anyway, delaying this Court, although the net result was perhaps an application for continuance. He was making every human effort to marshall together every eager asset available to him and his family with a view towards obtaining private counsel.

When he went before Mr. Weisman (phonetic spelling), the attorney who appeared before your Honor a week ago this past Friday, I believe Mr. Weisman was before the Court and indicated to the Court he would gladly represent this client, but had other commitments for the 14th of July and sought, at that time, a continuance for whatever his

reasons were.

THE COURT: He was advised by telephone before he came in, you know.

MR. WEINGARD: I am sure he wanted to prepare a record for the purposes of his application.

THE COURT: But the 20th, one week ago Friday --

MR. WEINGARD: Yes, I believe it was, Judge -- I'm sorry, you're right.

THE COURT: Two weeks ago --

MR. WEINGARD: It was the 27th. He came in on the 27th.

When he appeared before the Court on the 27th, he had engaged my client in a variety of discussions, the object being, as I understand it, to secure adequate financing so that he could be retained. And he came in at a point where he felt there was adequate funds so that he could be retained.

When Mr. Weisman could not obtain a continuance, my client was again left without any alternative except to take a free lawyer. And again, he did not wish to do this. He did not want a Court appointed lawyer. And he was referred to me by Mr. Weisman and I had a conversation with him on that very day, which would be the 27th. My client, subsequently,

contacted me with a view towards retaining me on the 3rd of July, which was just four working days following, and indicated to me, at that time, he had a portion which would have been to my way of thinking a reasonable retainer fee. And at that point, I indicated to your Honor's chambers my appearance in connection with this case. And the very first opportunity thereafter, which would be the following Monday following the 4th of July holiday, I signed my Notice of Appearance and came into this case. And today, being the day after, I am here on oral application.

THE COURT: Why do you need the time?

MR. WEINGARD: I will tell you, sir.

First off, Judge, my client is not a New York resident. He is a resident of Maryland. Whatever potential character witness defense we may have -

THE COURT: Character witnesses?

If he has got the man, you know how long it takes to prepare him. If it takes more than five minutes, he is no good.

MR. WEINGARD: You're absolutely correct. I am not talking about preparation. Location of character witnesses, logistics of bringing them here,

organizing schedules so that they are available until the week of the 14th --

THE COURT: You don't know when the Government's case will be over. You don't need time for that.

MR. WEINGARD: I will need the opportunity to marshall together the names of the character witnesses.

THE COURT: How many do you think I will allow you to have? Two, three? You will get his minister.

MR. WEINGARD: Maybe to take a cross section of the defendant's life and community --

THE COURT: I can approximate how long that would take a lawyer.

MR. WEINGARD: I am talking about the preparation and logistics of bringing them here, Judge.

THE COURT: It takes no time at all. When the Government's case is close to an end, you just tell him you get Mr. X down here and Mr. Y and Mr. Z, because they will come in the same day, the same car.

MR. WEINGARD: They come from Maryland or Washington in this case.

THE COURT: That's about two or three hours. So, you get these people to come in tomorrow

morning and put them on the stand.

MR. WEINGARD: These people are not necessarily--

THE COURT: Suppose you had six months to do this. Would you know when this trial commenced --

MR. WEINGARD: The precise date, no. But, there is an additional problem because of the summer holiday, Judge, vacation. Had I been able to alert my client's potential witnesses in advance of where we stand --

THE COURT: I don't go for that argument at all. If this case was scheduled before the summer and it was to start during the summer, your schedule would be all fouled up. You know now to call the witnesses that would be available on the 14th.

MR. WEINGARD: That's one reason why I need a continuance.

And also, because of my client's information to me, I would retain a private investigator to investigate this case. It's a serious one. I would try, where possible, to interrogate Government witnesses.

THE COURT: How do you know where they are?

MR. WEINGARD: I have been given a list of several co-conspirators.

MS. KATZ: No way did I indicate the list of co-conspirators with the witnesses during the trial, and nor do I right now indicate that.

THE COURT: Are the co-conspirators here in New York?

MS. KATZ: I don't know the location of some of the co-conspirators. We just given them all the opportunity to prepare the case they want.

I will not indicate now I am calling them as witnesses.

MR. WEINGARD: If I had an investigator, if I had the wherewithal to procure one --

THE COURT: That's the number one problem?

MR. WEINGARD: Yes, the time with which to prepare.

THE COURT: If he hasn't got the money --

MR. WEINGARD: Suffice it to say, whether he has the money or I have to advance the money out of my fee, if I have the time to do it in all probability --

THE COURT: Why don't you do this? Start today, hire your investigator and do all your investigating and come in Monday and show me you have hired your investigator, bring him in. I want

to know all the places he has been to, how much time he has spent between now and then and how much more time he wants.

MR. WEINGARD: In order for me to do that on such short notice, would cost an inordinate amount of money. If I were to dispatch a private investigator working at $50 an hour between now and Monday in order to go through a totally fruitless search for potential witnesses, and I haven't got a foggiest notice in which direction to send him in at this point in time because of my newness to the case.

THE COURT: Not the foggiest notice? Have you gone over the indictment with the defendant?

MR. WEINGARD: Of course I have.

THE COURT: And you have the names of the co-conspirators and the location of some?

MR. WEINGARD: I have no locations of any.

I will tell you exactly what I have. I have the following names, other known conspirators, counts nine, Carmel Bonita, (Phonetic spelling), Peter Micadese (phonetic spelling), Jane Doe, quote, Connie, close quote.

THE COURT: All right. Without disclosing the confidence or violating the privilege, did you

ask the defendant if he knows where any of them are?

MR. WEINGARD: I assume you asked me that rhetorically.

THE COURT: Rhetorically.

So, don't tell me you couldn't find the source.

MR. WEINGARD: No.

I am saying it would be inordinately extensive for me to do what you suggest, your Honor.

THE COURT: Tell me what else you have.

MR. WEINGARD: Also, that probably any alibi defense would lie in Maryland and Washington, D.C. area. And in order for me to ascertain my client's whereabouts, particularly in light of the very limited Bill of Particulars that the Government supplied, where they do not pinpoint precise times and dates and places of ocurrence, I would have to conduct an extensive investigation assisted by my client in the Maryland area and Washington area to reconstruct his whereabouts during the specific times. And we don't have the time to do that unless we are granted some form of reasonable continuance.

THE COURT: How much time do you want?

MR. WEINGARD: I can probably proceed after two

weeks. I am not asking for an unreasonable time in this case.

THE COURT: No, you're not.

The motion is denied. Go to trial on the 14th.

Had the defendant used the time he had, even as late as when Mr. Weisman came before me, and said he couldn't start the trial on the 14th, he would have been well prepared. I don't think you need that time.

MR. WEINGARD: Mr. Weisman was not in the case as counsel. He had not filed his Notice with the Court.

THE COURT: You overlook what I told the defendant. Don't retain a lawyer that can't start the trial.

MR. WEINGARD: May I proceed to my last argument, sir?

THE COURT: Yes.

MR. WEINGARD: And I say, as a purely legal argument, this is the most significant one I wish to advance.

Assuming now I won't be granted a severance, and assuming further, I cannot obtain a continuance,

I point out to the Court under Rule 7 and under the Fifth Amendment to the Constitution of the United States, my client has never been indicted by a Grand Jury. And by that, I am addressing myself to my client's right to an indictment of a Grand Jury under the Fifth Amendment, and that, of course, does not mean an indictment which by interpellation the prosecutor or the Court may use to say that the Grand Jury's indictment is one of my client's.

Turning to the caption heading in the indictment on hand, 75 CR 177, as I pointed out in the past, it is a John Doe indictment.

The indiction is that the Grand Jury had before it a nickname, to wit, the nickname Bebo, which we all came to learn in the past several years is not a very uncommon nickname.

THE COURT: I don't know anybody by the name of Bebo.

MR. WEINGARD: Bebe Rebozzo, Judge. I throw that up as --

THE COURT: That's one. Do you know him?

MR. WEINGARD: Only by his reputation.

THE COURT: That's one. Do you know anyone else by the name of Bebe?

MR. WEINGARD: Only by his reputatin.

THE COURT: Do you know anyone else?

MR. WEINGARD: That's one.

THE COURT: Before Bebe Rebozzo, I never heard of it before.

MR. WEINGARD: It could stand for the common initials B period E period.

THE COURT: That's right.

MR. WEINGARD: It could stand for any number of nicknames. My client is named Williams Morton.

I told the Court that William Morton must be indicted by a Grand Jury that has sufficient evidence before it to find that William Morton committed the alleged acts named in the indictment. The indictment here does not indicate that William Morton did any such thing.

THE COURT: I would like you to submit cases on that.

MR. WEINGARD: Let me, if I can give you the case of Connor v. Picard (phonetic spelling). And I have a photocopy of the case with me which deals with a statute in the State of Massachusetts which was declared unconstitutional.

THE COURT: May I see it?

MR. WEINGARD: Yes, indeed, sir.

As violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Now, this was a First Circuit Court of Appeals decision, Judge.

THE COURT: When can you submit cases on this? Do you have anything on it?

MS. KATZ: Mr. Weingard showed me that opinion.

I would cite Note Four of that opinion and indicate that the Grand Jury was presented with sufficient evidence as to Note Four.

MR. WEINGARD: With all due respect --

THE COURT: Note Four?

MS. KATZ: Yes, on Page 675, your Honor.

THE COURT: He didn't give me the complete case then.

MR. WEINGARD: I believe I did.

If I didn't, it's certainly an omission. I believe the footnote -- it maybe a different volume.

MS. KATZ: I have page 675 here, footnote four.

THE COURT: You said Note Four?

MS. KATZ: Yes, your Honor.

THE COURT: You mean footnote four?

MS. KATZ: Yes.

THE COURT: I thought you meant he had --

MS. KATZ: Excuse me, footnoe four on page 675.

MR. WEINGARD: Before the Court is distracted from any argument that I contemplate making, I wish to be able to be heard --

THE COURT: Please do that. I have allowed you more time than I have allowed ten lawyers on this motion.

MR. WEINGARD: Yes, I appreciate the opportunity

THE COURT: Yes.

MR. WEINGARD: This particular case touches upon it in the context of a review on a State Statute by a Federal Court. Eventually, I will point out, so the Court is not misled, the Supreme Court of the United States eventually remanded this case to the State Courts on the ground that there was no exhaustion of state remedies. But, the precise holding of the First Circuit, Court of Appeals, was not touched upon by the Supreme Court of the United States.

I would tell the Court it strikes me under Federal Law as opposed to the interpretation of the state rights, vis-a-vis the Federal Law, because und

federal law every defendant must be indicted by a Grand Jury if he is indicted for any crime to which he can be sentenced to more than one year.

THE COURT: You are saying nothing except the defendant has to be identified somehow. And the only question now is the nickname Bebe enough to identify the defendant.

MR. WEINGARD: It's more than that. The prosecutor does not have a roving commission or the right to interpellate as to what the Grand Jury meant when it handed down an indictment. The prosecutor can't go out and then condut its investigation and then come back into court with an individual and say this is the John Doe, a/k/a Bebe, that the Grand Jury meant.

What the prosecutor must do under those circumstances is go before the Grand Jury, if it's still sitting, or a subsequent Grand Jury, and present what other information it has and obtain a superseder. Before if this prosecutor came before your Honor right now and said to your Honor, I move to amend this indictment to change the name John Doe to William Morton, your Honor would under Rule 7, be constrained to deny that application in my view

because the amendment would be to an indictment rather than information.

THE COURT: I heard the argument.

When can you submit cases?

MS. KATZ: The Government will be happy to submit cases by the end of this week.

Can I make a few points?

I have not said very much during this discussion I would like to make a few points.

THE COURT: The answer is if you find you're wrong, you can get a superseding indictment before Monday. And I will not grant an adjournment if another indictment comes through if it's worded exactly the same. I don't know whether it's good or not.

MS. KATZ: Very well. I understand what the Judge is saying.

Could I still make, if you would bear with me for a few short minutes --

THE COURT: Yes.

MS. KATZ: As to what Mr. Weingard is saying, I believe there was evidence submitted to the Grand Jury which, of course, we will certainly make the Grand Jury minutes known to your Honor that indicates

certain factors as to Bebe's last name and believed description, residence, et cetera.

THE COURT: It would have been nice if you put that description in this indictment.

MS. KATZ: A lot of things from this case would have been nice viewing it from hindsight. Nonetheless, I still feel the indictment was sufficient.

At no time -- Mr. Williams, in fact, signed in Washington a bail release, I believe it's entitle Williams Morton, a/k/a Bebe.

THE COURT: Did he sign it that way or did he just sign William Morton?

MS. KATZ: William Morton, but the thing is headed --

THE COURT: What is the difference?

You're still going to have to prove it.

MS. KATZ: There was sufficient evidence before the Grand Jury to find John Doe, Bebe, had committed the acts named in the indictment and that the questi that Mr. Weingard is raising is properly a question for the jury to decide, that John Doe, Bebe, named in the indictment, who the Grand Jury charges as doing the alleged acts, is William Morton, who is sitting in the courtroom and that is really the prop

175 Fed. 2d 495, it's a Second Circuit case at Page --

THE COURT: Wait, give me that citation.

MS. KATZ: 175 Fed. 2d 495. I am reading at Page 496 in about the middle of the page. It deals with the defendant Morrison who was indicted under an indictment alleged John Doe number four, numeral four.

The Second Circuit states that Mr. Morrison sought a Writ of Habeas Corpus on the grounds that he was never indicted by the Grand Jury for the crimes charged in the John Doe indictment.

This was denied and the denial was affirmed in People ex rel Morrison v. Forrester, 62 NYS 2d 840.

To indicate if a John Doe number four was sufficient to identify an individual, certainly John Doe, a/k/a Bebe is sufficient to identify.

THE COURT: That would be very strong argument for it.

Is that the only case?

MS. KATZ: I only had five minutes to find it.

MR. WEINGARD: I read that case, your Honor. What happened, there was a New York Amendment of indictment provision and based upon an application

which was not opposed by the defendant, the indictment was amended to permit the name of the defendant to be substituted.

THE COURT: What is the sense in talking like this? I will read the case and make my decisions as to what the cases say, not what the lawyers say.

Now, how long do you wish to submit cases on this, Ms. Katz?

MS. KATZ: Friday.

THE COURT: How about tomorrow afternoon? Just give me the name of the case. I don't need a lengthy memoranda.

MS. KATZ: Very well, we will have it to you tomorrow afternoon.

THE COURT: Decision reserved on the last motion to dismiss because the defendant is not sufficiently identified in the indictment. And in all other respects, the motion is denied. And if I deny the motion on which I reserved decision, I expect the lawyers to be ready on Monday. The only problem is whether I am ready.

MR. WEINGARD: Will I be notified by your office as to the decision on this motion?

THE COURT: You certainly will.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

UNITED STATES OF AMERICA,

Plaintiff

against

LEONARD DURSO, et al.

Defendant

Docket #75-1342

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York ***ss.:***

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Queens, New York.

That on December 16th *1975 deponent served the annexed* Joint Appellant's Appendix *on* U.S. Department of Justice, on Richard Stolker, Esq. Criminal Division *attorney(s) for* Plaintiff *in this action at* Washington, D.C. 20530 United States Department of Justice *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me

this 16th day of December, 1975

H. ELLIOT WALES
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4129915
Qualified in Kings County
Commission Expires March 31, 1977

Lillian Kurtzer

The name signed must be printed beneath